THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY
NO. 2015-SC-000247-DE

A.H., APPELLANT,

v.

ON APPEAL FROM COURT OF APPEALS
NO. 2014-CA-001240-ME
KENTON CIRCUIT COURT CASE NO. 14-AD-00080

W.R.L., *et al.* APPELLEES.

REPLY BRIEF OF APPELLANT A.H.

Respectfully submitted,

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CERTIFICATE REQUIRED BY KY CR 76.12(6)

I certify that copies of this *Reply Brief of Appellant A.H.* were served upon the following by Federal Express on October 27, 2015: Amy H. Anderson, 2493 Dixie Highway, Ft. Mitchell, KY 41017; Jacqueline S. Sawyers, 2493 Dixie Highway, Ft. Mitchell, KY 41017; Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Chief Judge Acree, Kentucky Court Of Appeals, Tate Building, 125 Lisle Industrial Avenue, Suite 140, Lexington, KY 40511-2058; Hon. Debra Hembree Lambert, Kentucky Court of Appeals, Pulaski County Court of Justice, 50 Public Square, Suite 3808, Somerset, Kentucky 42501; Hon. Irv Maze, Kentucky Court of Appeals, 700 W. Jefferson St., Suite 1010, Louisville, KY 40202-4724; and Hon. Lisa O. Bushelman, Kenton Circuit/Family Court Judge, Kenton County Justice Center, 230 Madison Avenue, Covington, KY 41011. I also certify that ten (10) copies of this *Reply Brief of Appellant A.H.* were filed pursuant to Ky. CR 76.40 via Federal Express overnight delivery.

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STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

Appellees admit that their adoption petition was a cynical procedural maneuver designed to prevent A.H. from proceeding with a custody claim. The question raised in this appeal is, therefore, whether such procedural gamesmanship should trump the full and fair consideration of a claim for shared custody asserted by a person who has been acting as a parent to a child. This Court need not take Appellant's word for it; Appellees' own description of the legal chain-of-events that led to their filing of an adoption petition brings into sharp focus the critical issue that lies at the heart of this appeal:

> In February, 2014, M.L. ceased the child's visitations with A.H. . . . In late March, 2014, A.H.'s counsel corresponded with M.L. regarding A.H.'s desire to seek joint custody and shared parenting of M.L.'s child. Being opposed to the request by A.H. for joint custody and shared parenting of the child, M.L. and her husband then retained their own counsel. After researching the issue, counsel for M.L. and her husband determined that M.L.'s husband met the statutory requirements for a step-parent adoption of M.L.'s child under K.R.S. 199.470 *et seq.* . . .

(Appellees' Br. at 5) (citations omitted).

For the reasons stated in A.H.'s opening brief and in this reply brief, Kentucky law governing intervention prevents Appellees from using an adoption process to summarily cut off a court's consideration of the issue presented by A.H.'s custody claim—namely, whether shared custody would be in the child's best interests. Because the Kenton Family Court made factual findings indicating that A.H. has a viable claim for custody under this Court's analysis in *Mullins v. Picklesimer*, the Kenton Family Court correctly permitted A.H. to intervene in the adoption proceeding and correctly put the adoption on hold until the court had the opportunity to resolve the custody matter. The Court of Appeals decision to the contrary must, therefore, be reversed.

I. Appellees' Proposed Special Intervention Rule For Adoption Proceedings Finds No Support Under Kentucky Law And The Proposed Rule Contradicts Existing Case Law.

Appellant had the right to intervene in the adoption proceeding pursuant to CR 24.01, which permits intervention in an action when the intervenor has an interest in the property or transaction which is the subject of the action such that disposition of the action may as a practical matter impair or impede the intervenor's ability to protect that interest. Consistent with this statutory standard, A.H. presented sufficient facts through her petition to intervene and in a 40-minute hearing conducted by the Kenton Family Court, for that court to conclude correctly that A.H. had an interest in the subject of the adoption action—namely, the care and custody of the minor child—such that intervention was warranted under CR 24.01.

Ignoring the statutory standard, Appellees urge this Court to adopt a different, special intervention standard for adoption proceedings. Without citation to any legal authority, Appellees argue that "'standing' to intervene in an adoption proceeding is dependent upon one's 'standing' to seek an adoption." (Appellees' Br. at 14.) In other words, according to Appellees, if a proposed intervenor does not have the ability to adopt the child, then there is no right to intervene in an adoption proceeding.

Appellees' argument is flatly contradicted by existing Kentucky law. As argued in Appellant's opening brief, prior decisions of this Court demonstrate that a person who has a potential legal interest in the care and custody of a child has a right to intervene in an adoption proceeding involving that child, regardless of whether that person has the right to adopt. *See* Appellant's Brief at 7-12, *citing Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004) (permitting second cousins to intervene in an adoption proceeding even though they did not have the right to file their own adoption petition) and *Cabinet for Health and Family Services v. L.J.P.*, 316 S.W.3d

871 (Ky. 2010). Indeed, the application of general intervention principles to family law matters was recently again affirmed by this Court:

> The mandatory intervention rule, Civil Rule 24.01, states that an intervention of right is permitted "when a statute confers an unconditional right to intervene, or . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties." That rule might allow, for example, intervention in a divorce action of someone with an interest in property that is part of the marital estate. Cf. *Cordier v. Lincoln County Nat. Bank*, 702 S.W.2d 428 (Ky. 1986) (discussing intervention of a bank in a divorce action to protect interest in a promissory note signed by husband).

Bailey v. Bertram, 2015 Ky. LEXIS 1609, fn. 1 (May 14, 2015)[1]. As these cases make clear, if a proposed intervenor satisfies the statutory standard set forth in CR 24.01, then they have a right to intervene in an adoption proceeding. There is simply no legal support for the stricter standard advanced by Appellees.

Instead of offering legal precedent in support of their proposed intervention standard, Appellees instead make several unpersuasive arguments as to why *Baker* is distinguishable from the present case. First, Appellees incorrectly suggest that the second cousins who were permitted to intervene in *Baker* had a statutory interest in the care and custody of the child, while A.H. does not have any such statutory right. Appellees are wrong. It is true that, in *Baker,* this Court held that the second cousins should be permitted to intervene in an adoption proceeding initiated by foster parents in part because the statute governing temporary custody of children gave preference to placement to qualified relatives, a directive that had been ignored when the child had been placed with the foster family. Appellees are incorrect, however, to state that A.H.'s

[1] A copy of the not yet published *Bailey* decision is attached at Tab 1. Also attached are copies of two unpublished decisions that were cited in Appellant's opening brief – *Hammond v. Foellger,* 2007 Ky. Unpub. LEXIS 29 (Ky. Mar. 22, 2007) and *J.L. v. Cabinet*, 2010 Ky App. Unpub., LEXIS 639 (Ky. Ct. App. Aug. 13, 2010). These cases were inadvertently not included in the appendix to that brief and are attached here at Tabs 2 and 3. Counsel for Appellant apologizes to the Court for the error.

interest in the child involved in this case is "not granted by statute." (Appellees' Br. at 18.) A.H.'s custody claim is based on KRS 403.800 *et seq.* (the Uniform Child Custody Jurisdiction and Enforcement Act) and the interpretation of that statute by this Court in *Mullins v. Picklesimer*, 317 S.W.3d 569 (2010) (holding that the ex-partner of a biological mother had the right to seek custody under KRS 403.800(13) as "a person acting as a parent"). Thus, Appellees' statement that A.H. does not have a statutory basis for her claim is untrue.

Appellees' second basis for distinguishing *Baker* is also unpersuasive. Appellees argue that *Baker* was a case where the biological parents' rights had been terminated and that no such termination has occurred here. Yet, Appellees offer no legal authority or even coherent explanation as to why this distinction matters with respect to an intervention analysis. In fact, A.H.'s interest supporting intervention is far stronger than the interest of the second cousins in *Baker*. The second cousins in that case had a right to intervene because their statutory right to a temporary placement had been ignored. There was no indication that the cousins had a significant, parent-like relationship with the child in question. In contrast, in this case, the facts alleged in the petition to intervene and presented to the Kenton Family Court at the hearing on that petition establish that A.H. jointly decided to have a child with M.L. and agreed to act as a co-parent to that child. The alleged facts also show that the two women acted in accordance with that agreement and the child understands A.H. to be her mother. Thus, A.H.'s interest in the adoption proceeding is far greater than that asserted by the second cousins in *Baker*. That A.H.'s dispute is with her child's co-parent instead of a foster parent does not change the fact that her powerful interest in preserving her relationship with a child who knows her as a mother easily satisfies the intervention standard set forth in CR 24.01. Thus, Appellees have simply identified a factual distinction that has no legal relevance with respect to the law governing intervention.

Most importantly, Appellees have utterly failed to square *Baker* with the intervention standard that they encourage this Court to adopt. Although they argue that standing to intervene in an adoption proceeding is dependent upon standing to seek an adoption, that standard is inconsistent with *Baker*. Because Appellees offer no legal authority in support of their proposed standard and no reason at all for this Court to depart from *Baker*, the argument should be rejected and the decision of the Kenton Family Court should be reinstated.

II. Appellees' Attempt To Distinguish *Mullins v. Picklesimer* Is Unpersuasive—A.H.'s Custody Claim Is Entirely Consistent With This Court's Analysis In That Case.

Having failed to distinguish *Baker*, Appellees then turn their attention to attempting to undermine the legal basis for A.H.'s custody claim through inaccurate statements about how this case is different from the custody claim recognized by this Court as valid in *Mullins v. Picklesimer*.

First, Appellees incorrectly argue that *Mullins* is distinguishable, because what Appellees insist is "the most important factor" in *Mullins*—that the parties entered into a legally enforceable agreement regarding custody of the child—is not present here. (Appellees' Br. at 21.) Appellees are flat wrong that the parties in *Mullins* entered into a "legally enforceable" agreement regarding custody. Rather, the parties in *Mullins* drafted and executed an agreed judgment of custody that the trial court, the appellate court and this Court all found to be ***not*** legally enforceable. *Mullins*, 317 S.W.3d at 573 ("The [trial court] granted Picklesimer's motion to set aside the agreed judgment . . . ") ("The Court of Appeals also rejected Mullins' argument that the trial court erred in setting aside the agreed judgment of custody . . . ") and 578 (holding that "the trial court did not abuse its discretion in setting aside the agreed judgment . . . "). Thus, Appellees' claim that the parties in *Mullins* entered into a legally enforceable agreement is simply false.

Of course, the relevance of the non-enforceable agreement in *Mullins* is the same as the relevance of the sperm donor agreement that M.R. drafted and A.H. and the sperm donor signed in this matter. The written agreements in both cases—regardless of their enforceability—are evidence of the parties' intent to have a child together and act as co-parents. In both cases, the existence of a written agreement is not dispositive of the custody issue. Rather, the writings in each case are simply part of the panoply of probative evidence supporting the custody claim of the mother who is not the biological parent.

Appellees make a similarly disingenuous argument about the issue of *de facto* custodianship in *Mullins*. Appellees argue that "[d]e facto custodianship is one vehicle that grants a party standing [to seek custody]" and it was "present in the *Mullins* case and is clearly absent in the instant case." (Appellees Br. at 22.) Here again, Appellees are wrong. The *Mullins* court noted that even though the nonbiological mother in that case was providing care and financial support to the minor child, it was "undisputed" that she did ***not*** have *de facto* custody status. *Mullins*, 317 S.W.3d at 573. Indeed, it is in part because the parties had fraudulently stated in the executed agreed custody order that Mullins was a *de facto* custodian that the Court refused to enforce the agreement. Thus, here again, Appellees' attempt to distinguish *Mullins* is based on a false statement about the case.

What is true about *Mullins*, however, is that in that case this Court held that a person who has been "acting as a parent" can assert a viable claim of custody, even in the absence of a legally enforceable written agreement and in the absence of a *de facto* custodianship. As this Court noted, the right to seek custody in cases like this arises not from a signed document, but from evidence indicating that there has been an intent to co-parent and that the parties have acted in accordance with that intent. *Mullins*, 317 S.W.3d at 579. As a result of the agreement to co-

parent, the biological parent waives her superior right to be the sole decision-maker regarding the child and the right to sole possession of the child. *Id.* To determine whether there has been such a waiver, courts look to the totality of the evidence and no single factor, like a written agreement, is dispositive. *Id* ("[W]e believe these cases should be viewed on a case-by-case basis and that no specific set of factors must be present in order to find there has been a waiver.") Thus, Appellees' attempt to distinguish *Mullins* based on the absence or presence of a single factor is not only factually incorrect, it is fundamentally inconsistent with the broad, fact-finding analysis that this Court stated was necessary and appropriate to resolve custody matters.

Because of the significant and relevant factual similarities between this case and *Mullins,* the Kenton Family Court correctly concluded that A.H. has "presented a colorable claim to seek custodial rights to the child under *Mullins v. Picklesimer*." (Appellant's Br. Appendix Tab 2 at 2.) And, because A.H. does have a viable custody claim, she has a sufficient interest in the adoption proceeding to warrant intervention. As the Kenton Family Court noted, if A.H. is ultimately determined to be a joint custodian, then she would have the right to share in major areas concerning the child's upbringing. (*Id.*) Thus, it is necessary for the custody issue to be resolved before a court considers an adoption petition. The decision of the Court of Appeals reversing the family court's decision should, therefore, be reversed.

III. Appellees' Attempt To Undermine A.H.'s Custody Claim With Unsupported Factual Allegations That Are Not Part Of The Appellate Record Should Be Addressed By The Kenton Family Court In An Evidentiary Hearing On A.H.'s Custody Petition.

To bolster their weak legal arguments, Appellees mount a factual attack on A.H.'s custody claim in an improper attempt to turn this Court into a fact-finding tribunal. Indeed, Appellees devote over two pages in their Counter-Statement Of The Case to a section entitled "*A.H. is NOT A Parent Of M.L.'s Child*" in which they attempt to convince this Court that M.L.

never relinquished her exclusive custodial rights in favor of shared custody with A.H. But, Appellees' factual argument is devoid of any citation to the record and is, therefore, improper.

Appellees' attempt to interject unsupported factual assertions into the appellate record highlights the wisdom of how the Kenton Family Court handled this matter. The court permitted A.H. to intervene only after considering the alleged facts and legal argument presented in the intervention petition and then conducting a 40-minute hearing where counsel for all parties were permitted to address the issues. Then, the court made findings of fact that conclusively supported the decision to permit A.H. to intervene. It is important to note that that decision does not foreclose Appellees from presenting evidence in support of the factual allegations that they now raise for the first time in this Court. Rather, the Kenton Family Court simply recognized that there was a legitimate custody claim that needed to be given full and fair consideration before proceeding with an adoption.

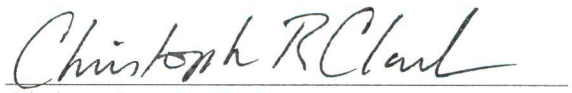
Appellees have offered no justification for this Court to determine that the factual findings of the Kenton Family Court supporting intervention were clearly erroneous. To the extent that Appellees want to present countervailing evidence, they will be permitted to do so in a contested evidentiary hearing on the merits of A.H.'s custody claim. Indeed, this Court has recognized that it is the trial courts—not the appellate courts—who have the responsibility for resolving factual disputes and considerable deference is accorded to their factual findings:

> Civil Rule 52.01 provides in part that findings of fact shall not be set aside unless clearly erroneous with due regard given to the opportunity of the trial judge to view the credibility of the witnesses. The rule also provides that in all actions tried upon facts without a jury, the court shall find the facts specifically and state separately its conclusions of law. One of the principal reasons for the rule is to have the record show the basis of the trial judge's decision so that a reviewing court may readily understand the trial court's view of the controversy. *See Fleming v. Rife*, 328 S.W.2d 151 (Ky. 1959); *Robinson v. Robinson*, 548 S.W.2d 155 (Ky. 1977). **These rules clearly apply to child custody cases and the findings of fact are particularly important in such situations.**

Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986) (emphasis added). Appellees' unsupported factual arguments should, therefore, be given no consideration at this juncture and this matter should instead be sent back to the Kenton Family Court for an evidentiary hearing on A.H.'s custody claim.

In summary, the Kenton Family Court's pragmatic approach in handling this matter was in accordance with the law governing both intervention and child custody and it respected the interests and rights of everyone—including, and most, importantly, the minor child. The court did not accede to Appellees' request to sever the relationship between A.H. and the child who knows her as a mother, but, instead, recognized the importance of resolving the custody issue before making any other decisions that might affect the child. Simply put, the Kenton Family Court put the best interests of the child first. Such a child-focused resolution should be affirmed and Appellees' cynical use of adoption procedure to thwart what may be in the best interests of a child should be rejected. Appellant respectfully requests that the decision of the Court of Appeals be reversed and that this matter be remanded to the Kenton Family Court for further proceedings.

Respectfully submitted,



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